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Criminal Law--Appeals--Poor Person's Appeal from Denial of Habeas Corpus Refused Where Issues Had Prior Adequate Review (People v. Martin, 9 N.Y.2d 351 (1961))

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of dissatisfaction with the remedial methods of the states for enforcing the right of privacy. Rather it is to impose upon the states a procedure which to a greater extent should prevent the breach of the right in the first place. It is this interest in preventing the breach of the right rather than giving a sufficient remedy that is at the heart of this decision. The majority may well be correct in concluding that unless the breach of the right of privacy can be prevented, then the right itself is a nullity.

It will be for future cases to decide whether the totality of federal case law on the exclusionary rule will also apply to the states. Several of the states which had accepted the rule prior to the instant case had exceptions to its application.[35] The effect of this decision on such state law is doubtful, but it would seem that, rather than apply the totality of federal law, the Court will decide each case in relationship to the test applied in the instant case—does it conform to the requirements of due process.

CRIMINAL LAW—APPEALS—POOR PERSON'S APPEAL FROM DENIAL OF HABEAS CORPUS REFUSED WHERE ISSUES HAD PRIOR ADEQUATE REVIEW.—Defendant filed notice of appeal from the county court's denial of his writ of habeas corpus but took no further steps to perfect it, instead appealing from the conviction to the Appellate Division and attacking the judgment on the same grounds he had relied upon in the habeas corpus proceeding. The conviction was affirmed by both the Appellate Division and the Court of Appeals. Defendant then moved for leave to have appeal from the habeas corpus denial heard as a "poor person." The motion was denied, and the appeal dismissed. From this dismissal defendant appealed to the Court of Appeals which *held* that where it appears from either the moving papers or the court's own records that the question sought to be reviewed in a post-conviction hearing has already been passed upon, the indigent defendant may not prosecute the appeal at public expense, "adequate appellate review" having been granted. *People v. Martin*, 9 N.Y.2d 351, 174 N.E.2d 475, 214 N.Y.S.2d 370 (1961).

"[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review," [1] but if provided,

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[35] For example, South Dakota and Wisconsin refuse to supress evidence because of technical irregularities in the search warrant. S.D. CODE § 34.1102 (Supp. 1960); WIS. STAT. ANN. § 963.08 (1958).

[1] Griffin v. Illinois, 351 U.S. 12, 18 (1956).

these must be made available to all. Thus, the United States Supreme Court, in the well noted [2] case of *Griffin v. Illinois*,[3] held that "destitute defendants must be afforded as adequate appellate review as defendants who have money. . . ." [4] The difficulty arises in delimiting "adequate appellate review." In *Griffin* the adequacy test was fulfilled upon the court order that the indigent be granted a trial transcript gratis. The court, however, noted that granting a trial transcript need not be the sole means of achieving this, and left open the door for courts to "find other means of affording adequate and effective appellate review to indigent defendants. . . ." [5]

Prior to the *Griffin* decision, the New York statute,[6] which granted an indigent defendant the right to a free trial transcript in capital cases where, upon the defendant's conviction, the sentence was death or life imprisonment, had been strictly construed.[7] However, interpreting the *Griffin* decision as a mandate to grant free transcripts in every instance, two lower court decisions extended this right to non-capital cases.[8] One of these decisions was quickly reversed [9] and the other disapproved,[10] solidifying the former and present position that no authority exists in New York to grant an indigent defendant a trial transcript gratis except in a proceeding involving a capital crime.[11] Thus the New York law concerning the right of an indigent defendant evolved because of the *Griffin* requirement of "adequate appellate review," and the disability of the New York courts to effectuate it through the means of a free trial transcript in non-capital cases.

In *People v. Kalan*,[12] the New York Court of Appeals held that the failure to appoint appeal counsel when the defendant lacked the financial means to acquire the record or employ counsel

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[2] See, *e.g.*, Comment, 55 MICH. L. REV. 413 (1957); Comment, 25 U. CHI. L. REV. 143 (1957); 59 W. VA. L. REV. 79 (1957).

[3] 351 U.S. 12 (1956).

[4] *Id.* at 19.

[5] *Id.* at 20.

[6] N.Y. CODE CRIM. PROC. §§ 308, 485. For a listing of other jurisdictions with similar provisions see Comment, 25 U. CHI. L. REV. 161 (1957). See also 3 N.Y.L.F. 317 (1957).

[7] People v. Raymondi, 180 Misc. 973, 43 N.Y.S.2d 217 (Kings County Ct. 1943), *appeal dismissed*, 268 App. Div. 863, 50 N.Y.S.2d 678 (2d Dep't 1944).

[8] People v. Strong, 159 N.Y.S.2d 351 (Kings County Ct. 1956); People v. Jackson, 2 Misc. 2d 521, 152 N.Y.S.2d 893 (Herkimer County Ct. 1956).

[9] People v. Strong, 4 Misc. 2d 748, 159 N.Y.S.2d 352 (Kings County Ct. 1957).

[10] People v. Brown, 3 App. Div. 2d 696, 158 N.Y.S.2d 1002 (4th Dep't 1957) (per curiam).

[11] People v. Pitts, 6 N.Y.2d 288, 160 N.E.2d 523, 189 N.Y.S.2d 650 (1959).

[12] 2 N.Y.2d 278, 140 N.E.2d 357, 159 N.Y.S.2d 480 (1957) (per curiam).

prevented "an effective use of the right to appeal in violation of the constitutional guarantees of due process and equal protection." [13] However, as in *Griffin,* the door was left open for the court to discover other means sufficient to assure the indigent an effective right to appeal. Thus, in *People v. Breslin,*[14] where the defendant *did* possess a copy of the trial transcript, it was held unnecessary to appoint counsel, for his possession of the record insured him the means to "adequate appellate review." [15] *People v. Pitts* [16] further clarified the New York position that when the right to appeal exists, the indigent defendant must be granted effective and adequate means to perfect that right. Such means could take the form of a trial transcript, or the appointment of counsel, these, however, not being exclusive of any other adequate means that might be discovered.

In *People v. Wilson,*[17] a new question was presented: an indigent's rights on appeal from denial of a writ of error coram nobis.[18] Defendant sought to appeal on typewritten briefs as a poor person from the county court's denial of the writ. Upon the district attorney's assertion of lack of substantial merit to the appeal, the right to appeal as a poor person was denied by the Appellate Division and the appeal dismissed "upon the ground that no record [had] been filed and there was no appearance for the [defendant]." [19] The Court of Appeals found this denial to be error relying upon Section 517 of the Code of Criminal Procedure which affords the right to appeal not only from a conviction, but also from a denial of a writ of error coram nobis. The indigent defendant must be granted an "adequate appellate

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[13] *Id.* at 280, 140 N.E.2d at 358, 159 N.Y.S.2d at 481. The constitution there referred to is the New York constitution, not the federal constitution. See N.Y. CONST. art I, §§ 6, 11.

[14] 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 157 (1958).

[15] The court carefully distinguished the *Griffin* and *Kalan* decisions, stating that in those cases, defendants "did not have transcripts of the trial proceedings, which precluded them from obtaining adequate appellate review. . . ." *Id.* at 77, 149 N.E.2d at 87, 172 N.Y.S.2d at 160. The dissent failed "to perceive how an imprisoned defendant's possession of a copy of the minutes . . . [rendered] use of his right to appeal a whit more effective." *Id.* at 81, 149 N.E.2d at 89, 172 N.Y.S.2d at 164. The two opinions thus sharply disagreed on what constitutes "adequate appellate review," for the dissent maintains that any effective presentation demands the aid of a lawyer.

[16] See note 11 *supra.*

[17] 7 N.Y.2d 568, 166 N.E.2d 838, 200 N.Y.S.2d 40 (1960).

[18] The prior cases of *Kalan, Breslin,* and *Pitts* each involved the denial of counsel upon a direct appeal from conviction.

[19] People v. Wilson, 7 N.Y.2d 568, 570, 166 N.E.2d 838, 839, 200 N.Y.S.2d 40, 41 (1960). It is important that the *right* to appeal remained open to the defendant, for he need merely file the record or make an appearance to have it entertained. What was denied him, however, was the *means* to do either of the two.

review" in both instances. Thus, in an appeal from a denial of a writ of error coram nobis, as in a direct appeal from a conviction, the indigent defendant must be granted "the means (*e. g.* a record or attorney) necessary to present the case to an appellate court." [20] In *People v. Borum*,[21] the court added that this right "does not depend upon . . . meritorious points, [and thus an appellate court] may not insist upon an indigent defendant showing substantial merit before entertaining his appeal."[22] In summary, the right to appeal being granted by section 517, it is the duty of the courts to assure the indigent defendant the means with which to render this appeal effective and adequate, without regard to the merits of his case.

The principal case involves an appeal from a denial of a writ of habeas corpus. The defendant sought to prosecute this appeal as a poor person, asserting his inability to otherwise achieve an effective appellate review. The Appellate Division denied the request and the Court of Appeals affirmed. The basis of this decision is not clear, the Court apparently utilizing alternate theories.

The arguments presently urged in the habeas corpus appeal had been previously rejected by the New York courts on the appeal from his conviction. Throughout these proceedings counsel or permission to employ typewritten briefs as a poor person had been granted. The court, in the light of this, felt the *Griffin* requirement of "adequate appellate review" had been complied with.[23] The rationale behind this holding would appear to be that although the requirements were not, in a strict sense, complied with in the *present* appeal, they had been complied with in the previous direct appeal from conviction wherein counsel *was* granted. Since identical issues and arguments were presented in the prior appeal as are here presented, the adequate appellate review therein granted in effect "carries over" to the habeas corpus appeal, fulfilling the state's obligations and the constitutional guarantees.[24]

However, there are also in the opinion indications that the Appellate Division's dismissal of the appeal is being affirmed on the basis of a lack of substantial merit to the appeal. The defendant urges that "the court should have applied the principle

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[20] *Id.* at 571, 166 N.E.2d at 840, 200 N.Y.S.2d at 42.

[21] 8 N.Y.2d 177, 168 N.E.2d 527, 203 N.Y.S.2d 84 (1960).

[22] *Id.* at 178, 168 N.E.2d at 528, 203 N.Y.S.2d at 85.

[23] Using the language employed in *Griffin*, the court said "this indigent appellant has already received 'as adequate appellate review as defendants who have money enough to buy transcripts.'" People v. Martin, 9 N.Y.2d 351, 354, 174 N.E.2d 475, 477, 214 N.Y.S.2d 370, 373 (1961).

[24] "Due process and equal protection impose no obligation on the State to accord a purposeless activity a constitutionally protected status." *Ibid.*

. . . in post-conviction proceedings *coram nobis* to the effect that an indigent defendant is not required to show substantial merit before his appeal may be entertained." [25] The dissent urges that indigent defendants must be given the same rights as more financially able defendants, and relies on the coram nobis *Borum* decision to the effect that substantial merit need not be shown.[26] Both disregard the fact that they are confronted with an appeal from habeas corpus, and *not* from coram nobis. As stated in *People v. Murphy*,[27] "the rule requiring us to grant leave to all indigent defendants to appeal on typewritten papers in coram nobis proceedings, without regard to the merit of the appeal does not extend to appeals in habeas corpus proceedings." [28] The court reasoned that habeas corpus is a civil proceeding governed by the Civil Practice Act and the Rules of Civil Procedure, which require a showing of substantial merit before a defendant is allowed to prosecute an appeal as a poor person.[29] The majority opinion recognizes this distinction [30] without expressly relying on it. However, the language employed does indicate the use of a substantial merit test.

If, in fact, the Court was distinguishing the present habeas corpus proceeding from those involving direct or coram nobis appeals, thereby justifying the application of a substantial merit test as set out in the Rules of Civil Practice,[31] a good deal more clarity than was utilized would have been appropriate. The "carry over" adequate appellate review theory would appear to have validity and be applicable not only in habeas corpus appeals, but also in coram nobis and direct appeals. However, in the latter two instances, a "substantial merit" theory may not be utilized in view of the precedents from *Griffin* to *Borum*, which grant the right to an adequate and effective appeal without a showing of merit. The danger lies in the thin line separating the "carry over" and "substantial merit" theories and the ease with which the two could become one.[32] The possibility of that oc-

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[25] *Id.* at 354, 174 N.E.2d at 476, 214 N.Y.S.2d at 372.

[26] *Id.* at 355, 174 N.E.2d at 477, 214 N.Y.S.2d at 373.

[27] 11 App. Div. 2d 1095, 206 N.Y.S.2d 484 (4th Dep't 1960) (memorandum decision).

[28] *Id.* at 1095, 206 N.Y.S.2d at 484-85.

[29] *Id.* at 1096, 206 N.Y.S.2d at 485. See also N.Y. CIV. PRAC. ACT § 196; N.Y.R. CIV. PRAC. 35-36.

[30] "[Defendant] made a cross motion for an order to have his appeal heard as a 'poor person' . . . without, however, certifying that a *good cause* existed." People v. Martin, *supra* note 23, at 353-54, 174 N.E.2d at 476, 214 N.Y.S.2d at 372. (Emphasis added.)

[31] See N.Y.R. CIV. PRAC. 35-36.

[32] Here, the adequate appellate review is carried over because the identical question was previously presented and dealt with. A court would need little

currence is enhanced when, as here, the two are used conjunctively, without clear distinction.

INTERNATIONAL LAW—FOREIGN DECREE MAY BE EXAMINED UNDER INTERNATIONAL LAW.—Farr, Whitlock & Co. contracted to purchase sugar from a wholly-owned Cuban corporate subsidiary of Compania Azucarera Vertientes-Camaguey [hereinafter referred to as C.A.V.], an American owned corporation incorporated in Cuba. Payment was to be made in New York upon the presentation of the necessary shipping documents. Before the loading of the sugar could be completed at the Cuban port of Jucaro, the Cuban government nationalized the property of C.A.V. In order to obtain the sugar, Farr, Whitlock & Co. subsequently entered into a new agreement with plaintiff's assignor, a government-owned corporation, containing the same terms as the original contract of sale. Thereafter, pursuant to Section 977-b of the New York Civil Practice Act,[1] the New York State Supreme Court appointed a temporary receiver for the New York assets of C.A.V., to whom Farr, Whitlock & Co. was directed to pay the proceeds of the sale. Plaintiff, a financial agent of the Cuban government, basing its claim upon the second agreement, sued in federal court to recover the sales proceeds either from Farr, Whitlock & Co. or from the receiver. The District Court, in dismissing plaintiff's complaint, *held* it could refuse to enforce a foreign nationalization decree which was in violation of international law. *Banco Nacional De Cuba v. Sabbatino,* 193 F. Supp. 375 (S.D.N.Y. 1961).

Prior to the instant decision, it was a well-established principle that the courts of this country would refuse to question the validity of an act of a foreign sovereign having intraterritorial effect.[2]

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ingenuity to carry over the previous adequate review when a *substantially* identical question had been previously reviewed.

[1] This section provides for the appointment of a receiver to liquidate New York assets of a foreign corporation which has been dissolved, liquidated, nationalized or has ceased to do business by revocation or annulment of its organic law or by dissolution or otherwise.

[2] See RE, FOREIGN CONFISCATIONS 58 (1951). The "Act of State" doctrine, while precluding the courts of the forum from reviewing the legislative and executive acts of the foreign state, does not preclude the review of "judicial proceedings of a foreign court resulting in a judgment if enforcement is sought in the courts of the forum." *Id.* at 59. Although foreign judgments are usually enforced on the basis of comity, courts have refused to give effect to them where they were violative of the public policy of the forum. Moreover, "foreign judgments . . . have been